In the Matter of Merchant Mariner's Document No. Z-862891 and all other Seaman Documents
Issued to: Leonard Andrew Libby

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1382

Leonard Andrew Libby

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 31 July 1962, an Examiner of the United States Coast Guard at New Orleans, Louisiana revoked Appellant's seaman documents upon finding him guilty of the charge of "conviction for a narcotic drug law violation." The sole specification found proved alleges that on or about 23 April 1957, Appellant was convicted in the Criminal District Court for the Parish of Orleans, State of Louisiana, a court of record, of violating a narcotic drug law of Louisiana.

At the hearing, Appellant was represented by professional counsel and pleaded not guilty to the charge and specification.

The Investigating Officer introduced in evidence a certified copy of the Information alleging violation of Louisiana's R.S. 40:962, to wit, unlawful possession of marijuana. On the back of the information is a notation by the minute clerk to the effect that Appellant pled guilty to "attempted possession" of marijuana. This uncontested notation suffices to show that Appellant was convicted.

In defense, Appellant offered his own testimony, the testimony of an Investigating Officer, and several letters and documents attesting to his good character.

At the end of the hearing, the Examiner rendered the decision in which he concluded that the charge and specification had been proved. The Examiner then entered an order revoking all documents issued to Appellant.

FINDINGS OF FACT

Appellant was convicted on 23 April 1957 in the Criminal District Court for the Parish of Orleans, State of Louisiana, a

court of record, after pleading guilty to attempted possession of marijuana in violation of a narcotic drug law of the State of Louisiana. He was sentenced to two and one-half years at hard labor in the State Penitentiary at Angola, Louisiana.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. The grounds of appeal are as follows:

1. The statute (46 U.S.C. 239b) is unconstitutional because it discriminates against a person convicted for possession of narcotics alone as opposed to one convicted for addiction (which must include possession) since the law precludes revocation in the latter case if "He furnishes satisfactory evidence that he is cured."

2. Considering the discretionary language ("may * * * revoke") in the statute, there are two reasons why it was arbitrary and capricious to exercise the power to revoke Appellant's documents:

   a. Equitable principles indicate that this action should not have been taken because Appellant has completely rehabilitated himself while sailing for three years after his release from prison. (Appellant raised his rating from messman to chief steward during this time.)

   b. The admiralty doctrine of laches should be applied to prevent irreparable damage to Appellant. It was prejudicial to initiate this action more than five years after the conviction.

In conclusion, it is requested that Appellant's merchant mariner's document be returned to him.

APPEARANCE: McKay and Doane by Walter E. Doane, Esquire, New Orleans, Louisiana, on the brief for Appellant

OPINION

Appellant's first contention on appeal is a direct attack upon the constitutionality of 46 U.S.C. 239b. Although an administrative agency has the power to pass upon constitutional questions in deciding whether it has jurisdiction to apply statute to the facts of a particular case, it does not have the authority to pass on the constitutionality of an act which it is called upon to administer. Engineers Public Service Co. v. S.E.C., 138 F. 2d

936, 952-953 (1943; Public Utilities Commission v. United States, 355 U. S. 534, 539 (1958). Only the courts have authority to take action which runs counter to the expressed will of a legislative body. See generally 3 Davis, Administrative Law Treatise §20.04 (1958).

Nevertheless, it is noted that the alleged discrimination within the statute is more illusory than real. In one case based on a court conviction for use of a narcotic drug, the Commandant remanded the record for the Examiner to consider, as evidence of cure, a Public Health Service physician's statement to the effect that Appellant was fit for duty (Commandant's Appeal Decision No. 1037). Since the Examiner then reinstated the order of revocation, the physician's statement was not considered to be "satisfactory evidence" of cure. (The second revocation ordered by the Examiner was not appealed.) This emphasizes the heavy burden placed on a seaman to enable him to escape the result of revocation regardless of the type of narcotics violation for which he has been convicted. Concerning an addict or a user, the very remote possibility exists that he can later produce satisfactory evidence showing rehabilitation as to the specific issue of addiction.

The record indicates that Appellant was convicted of violating Louisiana's narcotic drug laws in 1957, and that the action against his document was not instituted until 18 May 1962. 46 U.S.C. 239b specifically provides, in part, that "the Secretary [of the Treasury] may * * * take action, based on a hearing before a Coast Guard Examiner * * * to revoke the seaman's document of * * * any person who, subsequent to 15 July, 1954, and within ten years prior to the institution of the action, has been convicted in a court of record of a violation of the narcotic drug laws of the United States * * * or any State or Territory of the United States * * * ." The authority of the Secretary under this statute has been delegated to the Commandant of the Coast Guard. see 46 CFR 137.01-5(b) for the Federal Register citation of this delegation. Hence, the determination to "take action" rests with the Commandant who has previously stated that revocation is the only permissible order against a seaman's documents after the specification and charge have been proven. See Commandant's Appeal Decision Nos. 806, 1225. this interpretation is based on the fact that the statute (46 U.S.C. 239b) provides only for revocation after the discretionary function as to whether to take action has been exercised and it has been determined that action is to be taken by charging the seaman who has been convicted. See Commandant's Appeal Decision No. 1274. Since the present contention, that the discretionary function to take action should not have been exercised, was not raised in these other cases, it is apparent that the language used was based on the assumption that there had been no abuse of discretion by initiating the proceedings.

For the reasons which follow, I do not think it was arbitrary or capricious to exercise the discretion to charge Appellant with this conviction approximately five years after it occurred.

With respect to the equitable principles referred to by Appellant, the Coast Guard has consistently taken the position that seamen who have been associated with narcotics in any manner constitute a serious threat to the safety of life and property at sea. Appellant was convicted of an offense which was serious enough to result in a sentence of two and one-half years at hard labor. Although he managed to sail for three years after his release from prison and has submitted several letters attesting to his good character, it is my opinion that this is not satisfactory evidence to establish that Appellant has rehabilitated himself to the extent that he has severed all connections with narcotics and, therefore, is fit to continue his livelihood at sea. It is felt that circumstances, under which it might be said that the discretion to revoke under the statute was exercised arbitrarily, are extremely limited relative to the aspect of proof of rehabilitation.

The application of the doctrine of laches applies to cases where there has been an inexcusable delay in commencing an action or prejudice in preparing the defense.

In the instant case the record indicates that charges against Appellant were brought approximately a year after the Coast Guard learned about Appellant's conviction. The Investigating Officer testified that "sometime between 10 May 1961 and May of 1962 I recall making efforts to locate the whereabouts of Mr. Libby * * *" (R.34). It is often impossible to avoid such delays because of the transitory nature of a seaman's occupation. Since there is no indication that the efforts to locate Appellant were handled in a careless manner or that the Coast Guard was negligent in not knowing of this conviction at an earlier date, there was no inexcusable delay.

There was no prejudice to Appellant with respect to obtaining evidence in his defense since the fact of conviction is conclusive and it was not contested. It is unfortunate for Appellant that this action interrupts his livelihood at this time but the statute provides that action may be brought within ten years after conviction.

It is my conclusion that the action taken to revoke Appellant's document was not arbitrary or capricious and, therefore, there was no abuse of the discretion granted by the statute. See United States ex rel. Hintopoulos v. Shaughnessy, 353 U.S. 72, 77 (1957).

ORDER

The order of the Examiner dated at New Orleans, Louisiana, on 31 July 1962, is AFFIRMED.

E. J. Roland
Admiral, United States Coast Guard
Commandant

Signed at Washington, D. C., this 2nd day of April 1963.